IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CMPMO No.160 of 2006.

Date of Decision: 6th September, 2006.

Sukhbir Singh. …. Petitioner

Versus

National Insurance Co. Ltd. and another. Respondents

Coram

The Hon'ble Mr. Justice V.K. Gupta, C.J.

Whether approved for reporting[1]?

For the Petitioner: Mr. Rahul Mahajan, Advocate.

For the respondent: Mr. Ashwani K. Sharma, Advocate, for respondent No.1.

Mr. Rajnish K. Lal, Advocate, for respondent No.2.

V.K. Gupta, C.J. (Oral).

An award was passed on 27th February, 2003 by the learned Motor Accidents Claims Tribunal, Mandi in Claim Petition No.36 of 1998 relating to and arising out of the death of Dr. N.C. Sharma in an accident involving his official jeep and a truck tipper No.PB-110-9313. The petitioner Sukhbir Singh in this petition was respondent No.1 in the aforesaid Claim Petition. Respondent No.2 herein Ashok Kumar was respondent No.2 in the Claim Petition. Respondent No.1 – National

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[1] Whether reporters of the Local Papers are allowed to see the Judgment?

Insurance Company was the 3rd respondent in the Claim Petition. Petitioner and respondent No.2 were the owner and the driver respectively of the truck tipper No.PH-110-9313.

In the written statement filed by respondent No.1 – National Insurance Company in answer to the Claim Petition, it was alleged and pleaded that the driver did not possess a valid and effective driving licence at the time of the accident. Based on the pleadings of the parties, following five issues were framed by the Tribunal for adjudication:-

> "1. Whether the accident occurred due to the rash and negligent driving of the driver of the tipper, No.PB-110-9313, by respondent No.2 as alleged? OPP.
> 2. Whether the accident occurred due to rash and negligent driving of the driver of the jeep No.25-0335? If so, its effect? OPR-1&2.
> 3. Whether the driver of the tipper did not possess the valid and effective driving licence at the time of accident? OPR-3.
> 4. Whether the petitioners are entitled to compensation? If so, of what amount and from whom? OPP.
> 5. Relief."

Findings on issues No.1 and 2 having gone in favour of the claimants, and with respect to

issue No.4, the Tribunal having determined the amount of compensation which the claimants were held entitled to receive, in so far as issue No.3 is concerned, the Tribunal held that the two licences produced during the course of enquiry by the Tribunal, being licences No.1169/96 and 5977, were fake. The Tribunal thus, in so far as issue No.3 is concerned held as under:-

> **"……It was for the driver to explain from where he had got the licence issued and both the licences produced by them had been proved to be fake one and as such there was breach of condition of the insurance policy and, therefore, the respondent No.3 is not liable to pay the amount and respondents No.1 and 2 both are jointly and severally liable to pay the amount in full. ……"**

The aforesaid observations are contained in para 25 of the judgment and award dated 27th February, 2003.

Based on the aforesaid finding with respect to issue No.3, even though the Tribunal held and decided that the Insurance Company had to, in the first instance, pay the compensation amount to the claimants, it was permitted to recover this amount subsequently from respondents No.1 and 2. Admittedly, neither the petitioner herein nor

Ashok Kumar, respondent No.2 had either challenged the aforesaid award in any manner nor had filed any appeal against the same in any superior Court. As far as these two persons are concerned, admittedly the aforesaid award and judgment had assumed finality qua both of them.

Strangely and curiously, despite the fact that apparently the aforesaid award was passed in favour of the Insurance Company in the sense that on the face of it the Tribunal had declared that the licences were fake and, "there was breach of condition of insurance policy" and further that it permitted the Insurer to recover the award amount from respondents No.1 and 2 in the Claim Petition, of course after initially paying the same to the claimants, the Insurance Company filed a statutory appeal against the aforesaid award, being FAO (MVA) No.271 of 2003 which was rejected by a Single Judge of this Court vide judgment dated 13th June, 2003. Not only this, the Insurer went a step further by filing a Special Leave Petition in the Supreme Court which also was dismissed.

Because of the mandate contained in the award dated 27th February, 2003, the Insurer put in motion the process for recovering the award amount from the petitioner and respondent No.2

herein by filing an application under Section 174 of the Motor Vehicles Act, 1988. The amount in question is Rs.15,90,194/- which respondent No.1 had paid to the claimants.

To this application filed by the Insurer under Section 174, the petitioner Sukhbir Singh raised a preliminary objection about its very maintainability and also put forth various points, aspects and defences in support of his contention that he was not liable to pay the amount claimed by respondent No.1 - Insurer. The learned Tribunal vide the impugned order dated 29th April, 2006 has rejected the aforesaid preliminary objection of the petitioner and proceeded to recover the amount from the petitioner. Aggrieved the petitioner has filed this petition under Article 227 of the Constitution of India challenging the correctness and the legality of the aforesaid impugned order.

It is no doubt true that the award dated 27th February, 2003, as far as the petitioner is concerned had assumed finality because the petitioner has not challenged this award. It is also no doubt true that in deciding issue No.3, the Tribunal in the aforesaid award had held that both the licences produced before it by the petitioner as well as respondent No.2 were fake

and thus, "there was breach of condition of the insurance policy". The question which, however, arises for my consideration in this petition is whether, despite the aforesaid finding on issue No.3 and the aforesaid observation about there being a breach of the condition of insurance policy, did the Tribunal return a finding, in clear and categorical terms that the petitioner was guilty of the breach himself and whether he knew that the vehicle in question was being driven by respondent No.2 without a valid driving licence. For the reasons that I assign hereafter I must very candidly admit that on a very careful perusal of the award dated 27th February, 2003, it can safely be inferred and concluded that neither the Tribunal returned such a finding nor did it have any material before it to come to a conclusion that the petitioner was guilty of breach of a policy condition in the sense that he knew that respondent No.2 did not have a valid driving licence or that despite it having such knowledge, he permitted respondent No.2 to drive the vehicle. A very strange aspect of the case may be noticed at this stage.

Even though the petitioner did not file any appeal against the award, in the appeal filed by the Insurer - respondent No.1, being FAO (MVA)

No.271 of 2003 which, as noticed earlier, was rejected by this Court vide its judgment dated 13th June, 2003, this Court in clear and categorical terms held that no evidence was led to show that the owner of the vehicle, namely, the petitioner herein was in the knowledge of fact that the driver was not holding a valid driving licence and that in spite of such knowledge he had allowed the driver to drive the vehicle in question. This observation and finding of fact by this Court in the aforesaid appeal was recorded in the context of the ratio laid down by their Lordships of the Supreme Court in the case of *United India Insurance Co. Ltd*. vs. *Lehru and others*, reported in (2003) 3 SCC 338 (to be discussed later on in the course of this judgment). The aforesaid observation and finding by this Court in the aforesaid judgment dated 13th June, 2003 may be reproduced hereunder for ready reference:-

> **"The appellant – Insurance Company while resisting the claim has raised the plea that the driver, namely, respondent No.7 was not holding a valid driving licence. During the course of evidence, two driving licences Ex.R-1 and R-2 in favour of respondent No.7 were placed and proved on the record. However, no evidence was led to show**

that owner of the vehicle, namely, respondent No.6 was in the knowledge of fact that respondent No.7 was not holding a valid driving licence and that inspite of such knowledge he had allowed respondent No.7 to drive the vehicle in question.

The Hon'ble Supreme Court in United India Insurance Company Ltd. vs. Lehru and Ors. (JT 2003 (2) SC 595) has held that it is only where the Insurance Company proves that owner/insured was aware (sic) or had notice that the licence was fake (sic) and still permitted that person to drive the vehicle, the Insurance Company would be absolved of its liability but in any eventuality the Insurance Company would remain liable to the third party but may be able to recover the amount from the insured. While so holding, the Hon'ble Supreme Court reiterated the law laid down in Skandia Insurance Co. Ltd. vs. Kokilaben Chadravadan (JT 1987 (2) SC 43)."

What, therefore, clearly emerges is that the Tribunal did not have any material before it to suggest or to come to a conclusion that the petitioner was guilty of the violation or breach of the policy condition nor did the Tribunal specifically hold the petitioner guilty despite using a vague expression that there was a breach

of policy condition and as if to bolster this aspect further, this Court returned the aforesaid clear and categorical finding that there was no evidence led before the Tribunal to show that the petitioner was either in the knowledge of the fact that respondent No.2 was not holding a valid driving licence or that despite this knowledge he had allowed him to drive the vehicle. I must say with a total candour that the observation and finding of this Court in the aforesaid judgment is factually correct because a careful perusal of the record of the Tribunal does show that no material was placed before the Tribunal to suggest any of the aforesaid two aspects relating to the petitioner.

The question whether the Insurer can avoid its liability qua the insured on the ground of breach of a policy condition relating to the holding of a valid driving licence and consequently whether the Insurer will have to establish that the insured is guilty of such a breach of policy condition first came up for consideration in an important judgment of the Supreme Court in the case of *Skandia Insurance Co. Ltd*. vs. *Kokilaben Chandravadan and others*, reported in AIR 1987 SC 1184. Dealing with this

question, their Lordships of the Supreme Court held as under:-

> "14. Section 96(2)(b)(ii) extends immunity to the Insurance Company if a breach is committed of the condition excluding driving by a named person or persons or by any person who is not fully licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification. The expression 'breach' is of great significance. The dictionary meaning of 'breach' is 'infringement or violation of a promise or obligation' (see Collins English Dictionary). It is therefore abundantly clear that the Insurer will have to establish that the insured is guilty of an infringement or violation of a promise that a person who is not (sic) duly licensed will have to be in charge of the vehicle. The very concept of infringement or violation of the promise that the expression 'breach' carries within itself induces an inference that the violation or infringement on the part of the promisor must be a willful infringement or violation. If the insured is not at all at fault and has not done anything he should not have done or is not amiss in any respect how can it be conscientiously posited that he has committed a breach? If is only when the insured himself places the vehicle in

charge of a person who does not hold a driving licence, that it can be said that he is 'guilty' of the breach of the promise that the vehicle will be driven by a licensed driver. It must be established by the Insurance Company that the breach was on the part of the insured and that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a breach the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that the promisor (the insured) committed a breach of his promise. Not when some mishap occurs by some mischance. When the insured has done everything within his power inasmuch as he has engaged a licensed driver and has placed the vehicle in charge of a licensed driver, with the express or implied mandate to drive himself it cannot be said that the insurer is guilty of any breach. And it is only in case of a breach or a violation of the promise on the part of the insured that the insured can hide under the umbrella of the exclusion clause……..."

In the case of *Sohan Lal Passi* vs. *P. Sesh Reddy and others*, reported in (1996) 5 SCC 21 dealing with the aforesaid aspect and by referring to the ratio in the aforesaid judgment

in the case *Skandia Insurance Co. Ltd*. (supra), their Lordships observed as under:-

> **"……In other words, once there has been a contravention of the condition prescribed in sub-section (2)(b)(ii) of Section 96, the person insured shall not be entitled to the benefit of sub-section (1) of Section 96. According to us, Section 96(2)(b)(ii) should not be interpreted in a technical manner. Sub-section (2) of Section 96 only enables the insurance company to defend itself in respect of the liability to pay compensation on any of the grounds mentioned in sub-section (2) including that there has been a contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. This bar on the face of it operates on the person insured. If the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. In a case where the person who has got insured the vehicle with the insurance company, has appointed a duly licensed driver and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorised to drive the vehicle whether the insurance company in that event shall be absolved from its liability? The expression**

'breach' occurring in Section 96(2)(b) means infringement or violation of a promise or obligation. As such the insurance company will have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was willful. If the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that it was the insured who allowed the vehicle to be driven by a person not only licensed, then the insurance company cannot repudiate its statutory liability under sub-section (1) of Section 96. ……"

In a latter judgment in the case of *New India Assurance Co., Shimla* vs. *Kamla and others,* reported in AIR 2001 SC 1419, it was held as under:-

"25. The position can be summed up thus: The insurer and insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate

of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there is any breach of policy conditions on account of the vehicle being driven without a valid licence. Learned counsel for the insured contended that it is enough if he establishes that he made all due enquiries and believed bona fide that the driver employed by him had a valid driving licence, in which case there is no breach of the policy condition. As we have not decided on that contention it is open to the insured to raise it before the Claims Tribunal. In the present case, if the Insurance Company succeeds in establishing that there was breach of the policy condition, the Claims Tribunal shall direct the insured to pay that amount to the insurer. In default the insurer shall be allowed to recover that amount (which the insurer is directed to pay to the claimants – third parties) from the insured person."

Next in line in the series of judgments on this subject was the case of *United India Insurance Co. Ltd.* vs. *Lehru and others*, reported in (2003) 3 SCC 338 wherein the following pertinent observations were made:-

"20. When an owner is hiring a driver he will therefore have to check whether

the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire and driver. We find it rather strange that insurance companies expect owners to make enquiries with RTOs, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The insurance company would not then be absolved of liability. If it ultimately turns out that the licence was fake, the insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly, even in such a case the insurance company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skandia, Sohan Lal Passi and Kamla cases. We are in full agreement with the views expressed

therein and see no reason to take a different view."

In the case of ***National Insurance Co. Ltd***. vs. ***Swaran Singh and others***, reported in 2004 ACJ 1, a three Judge Bench of the Supreme Court dealing extensively with various aspects relating to the applicability of various Sections of the Motor Vehicles Act, 1988 specifically dealt with the question of breach of policy condition relating to the holding of valid driving licence and the consequent right of the Insurer to be absolved of its liability held that the Insurance Company with a view to avoid its liability is not only obliged to show that the condition about the holding of a valid driving licence as per Section 149 of 1988 Act has not been satisfied, but further is required to establish that there has been a direct breach on the part of the insured. Such a breach on the part of the insured must be established by the Insurer to show that not only the insured used or caused or permitted the vehicle to be used in breach of such a policy condition but also that the damage he suffered flowed from the breach. The following observations are pertinent and I quote:-

"42. Furthermore, the insurance company with a view to avoid its liabilities is

not only required to show that the conditions laid down under section 149 (2) (a) or (b) are satisfied but is further required to establish that there has been a breach on the part of the insured. By reason of the provisions contained in the 1988 Act, a more extensive remedy has been conferred upon those who have obtained judgment against the user of a vehicle and after a certificate of insurance is delivered in terms of section 147 (3) a third party has obtained a judgment against any person insured by the policy in respect of a liability required to be covered by section 145, the same must be satisfied by the insurer, notwithstanding that the insurer may be entitled to avoid or to cancel the policy or may in fact have done so. The same obligation applies in respect of a judgment against a person not insured by the policy in respect of such a liability, but who would have been covered if the policy had covered the liability of all persons, except that in respect of liability for death or bodily injury.

43. Such a breach on the part of the insured must be established by the insurer to show that not only the insured used or caused or permitted the vehicle to be used in breach of the Act but also that the damage he suffered flowed from the breach."

Referring to the judgment in *Skandia's* case (supra) and thereafter in *Sohan Lal Passi's* case (supra), their Lordships held that the correctness of the decision in *Skandia's* case was approved by a three Judge Bench in *Sohan Lal Passi's* case and it authoritatively laid down the law that who alleges the breach must prove the same. The following observations are pertinent and I quote:-

> **"62. The proposition of law is no longer *res integra* that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. [See Sohan Lal Passi, 1996 ACJ 1044 (SC)]."**

The law is now well settled as well as it is absolutely clear. It is that the Insurance Company cannot absolve its liability to pay the insured unless it is established that the insured was guilty of breach of a policy condition. The onus to establish this fact, as per the consistent view of the Supreme Court in all the aforesaid judgments is upon the Insurer. The

Insurer must prove that the insured was guilty of breach of policy condition, viz. that he was aware and had knowledge of the fact that the driver engaged by him to drive the vehicle did not possess a valid driving licence and despite having this knowledge and despite such awareness, he had allowed such a driver to drive the vehicle.

In the present case, it is no doubt true that whereas the Tribunal in the award dated 27th February, 2003 did return a categorical finding of fact that two licences produced were fake which in effect and substance meant that the driver, respondent No.2 herein did not hold a valid driving licence at the time of the accident, on a question of fact it did not specifically lay down and hold that the petitioner himself was guilty of the breach of policy condition in the sense that the petitioner knew and was aware of the fact that respondent No.2 did not hold a valid driving licence at the time of the accident and that despite awareness and knowledge of such fact he nonetheless permitted respondent No.2 to drive the vehicle at the time of the accident. No doubt the Tribunal has used a vague expression about the policy condition having been breached, this expression

did not find its support from the reasons cited during the course of the judgment nor was it based on evidence led before the Tribunal or any material available to the Tribunal. More specifically, the Tribunal did not relate the so called breach of policy condition specifically to the petitioner. This is apart from the fact that this Court in the course of judgment dated 13th June, 2003 (supra) took a definite view, a categorical stand that no evidence was led before the Tribunal to show that the petitioner had the knowledge or awareness and/or that despite such knowledge or awareness, the petitioner permitted respondent No.2 to drive the vehicle at the time of the accident.

Yes, the petitioner did not challenge the award dated 27th February, 2003. Yes, to that extent it can be said that the award had assumed finality qua the petitioner. But then in the light of the aforesaid discussion, I have no hesitation in holding that the award by itself either in conclusive terms or otherwise did not at all hold the petitioner guilty of breach of the policy condition. On the other hand, this Court in the judgment dated 13th June, 2003 (supra) held to the contrary. In the light of the law laid down by their Lordships of the

Supreme court, this Court cannot allow a situation to come about where despite the absence of such a finding, the petitioner is asked to pay to respondent No.1. Any finding, therefore, returned by the Tribunal in the award dated 27th February, 2003, if at all it could be construed qua or against the petitioner has thus to be declared as nonest in the eyes of law.

For the foregoing reasons, therefore, this petition is allowed. The impugned order is set aside. The petitioner and respondents are relegated to the Tribunal because this Court is convinced that the Tribunal based upon a further enquiry by itself has to decide whether the petitioner was guilty of the breach of policy condition or not. As held above, the onus to prove this fact is upon respondent No.1. Respondent No.1, therefore, has to be given an opportunity of proving and establishing the breach of policy condition on the part of the petitioner, subject of course to the petitioner being permitted to prove to the contrary. Only upon the breach of policy condition having been proved and established, would the petitioner be liable to pay the amount in question to respondent No.1. The Tribunal, therefore, is directed to hold and complete the aforesaid

enquiry in the shortest possible time and depending upon its finding on the aforesaid aspect to pass consequential order.

The petition is allowed and disposed of. No order as to costs.

CMP No.314 of 2006.

In view of the disposal of the main petition, this application shall stand disposed of.

6th September, 2006. (V.K. Gupta), C.J.
(tr)